NO. 41719-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

RUSSELL O'BRIEN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Vicki Hogan, Judge

REPLY BRIEF OF APPELLANT

RITA J. GRIFFITH
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STATUTES, RULES AND OTHER AUTHORITY :

A. MR. O'BRIEN PRESENTED EVIDENCE OF THE PLEA AGREEMENT OF THE PARTIES THROUGH HIS ATTORNEY, ACTING AS AN OFFICER OF THE COURT; AND THE PROSECUTOR, WHEN GIVEN THE OPPORTUNITY TO REBUT TRIAL COUNSEL, CONCEDED THAT THE AGREEMENT MIGHT WELL HAVE BEEN FOR CONCURRENT TERMS.

At the hearing on Mr. O'Brien's Motion to Correct the Judgment and Sentence, trial counsel, John Felleisen, told the court that he could, as an officer of the court, swear or testify that the state agreed to recommend a sentence concurrent with the three other cause numbers which were part of the revoked DOSA; and that he advised Mr. O'Brien that the agreement was for concurrent terms. RP 4, 8. This statement by trial counsel was unrebutted. The prosecutor at the hearing, in fact, conceded that "the prosecutor at the time may have told Mr. Felleisen we are going to run this concurrent." RP 7.

The court never resolved the questions of what the bargain was, and denied the motion on the grounds that "by operation of law the sentence could not be concurrent with a revoked DOSA." RP 9.

B. THE STATEMENT OF DEFENDANT ON PLEA OF GUILTY APPEARS TO HAVE A DASH (--) BETWEEN THE WORDS "RESTITUTION" AND "CONCURRENT." WHICH WOULD MAKE THE WORD "CONCURRENT" APPLY TO THE ENTIRE RECOMMENDATION NOT JUST RESTITUTION.

The prosecutor's recommendation on the Statement of Defendant on Plea of Guilty is handwritten. It appears to be:

> The prosecuting attorney will make the following recommendation to the judge: 60 months in custody, credit for 60 days served $200 costs, $500 CVPA, $100 DNA [unreadable], $600 DA recoupment, restitution — **concurrent** with 05-1-06126-1, 01-1005727-2.

CP 6-14. The dash (--) indicates that "concurrent" refers to the entire recommendation not just to "restitution." Particularly, as defense counsel noted at the hearing on the Motion to Correct Judgment and Sentence, it would "not be logical that we would recommend only restitution to run concurrent. . . ." RP 6.

C. THE JUDGMENT AND SENTENCE DOES NOT SPECIFY THAT THE SENTENCE WOULD RUN CONSECUTIVELY TO THE REVOKED DOSA SENTENCES.

The Judgment and Sentence does not indicate, in the relevant portion, that the sentence would run consecutively to any other sentences. CP 15-26. While the form for the Judgment and Sentence says "The sentence herein shall run consecutively to all felony sentences in other cause numbers prior to the commission of the crime(s) being sentenced" -- a

sentence included on every Judgment and Sentence -- this is followed by a _____ for entering such cause numbers. This blank is not filled in even though those cause numbers are noted elsewhere on the Judgment and Sentence. CP 15-26. Thus, there is nothing on the Judgment and Sentence indicating an intent by the trial court to impose sentence consecutive to the revoked DOSA.

D. THE TRIAL COURT ERRED IN DENYING MR. O'BRIEN'S MOTION TO CORRECT JUDGMENT AND SENTENCE ON THE GROUNDS THAT BY OPERATION OF LAW, THE SENTENCE COULD NOT BE IMPOSED CONCURRENTLY WITH THE REVOKED DOSA; SUCH A SENTENCE COULD BE IMPOSED AS AN EXCEPTIONAL SENTENCE.

As respondent concedes, Mr. O'Brien's sentence could have been imposed as an exceptional sentence. See, Brief of Respondent at 8; *State v. Breedlove*, 138 Wn.2d 298, 306-309, 979 P.2d 417 (1999); *State v. Lee*, 132 Wn.2d 498, 506, 939 P.2d 1223 (1997). Thus, this is not a case of a mutual mistake of fact. *State v. Barber*, 170 Wn.2d 854, 248 P.3d 494 (2001). The parties bargained for a sentence which the court could have imposed and likely intended to impose, although the Judgment and Sentence is ambiguous. The trial court should have corrected the Judgment and Sentence to reflect the intent of the parties and the court.

In any event, however, the trial court's denial of Mr. O'Brien's Motion to Correct Judgment and Sentence was erroneous. It was based on

the incorrect legal assumption that by operation of law, concurrent terms could not have been imposed: "**if** by operation of law the sentence could not be run concurrent with a revoked DOSA and it was clear at the time of the sentencing he had a revoked DOSA, **then** this was a proper sentence." RP 9. The trial court's denial of his Motion to Correct Judgment and Sentence was in error.

E. THE COURT SHOULD HAVE HELD AN EVIDENTIARY HEARING TO RESOLVE ANY DOUBT ABOUT THE FACTS ON WHICH THE MOTION WAS BASED.

If there was any doubt about the underlying facts on which the Motion to Correct Judgment and Sentence was based, the trial court should have conducted an evidentiary hearing. Instead the trial court ruled in spite of finding that it found that it was uncertain what the understanding of the parties was at the time the plea was entered. RP 9.

Respondent asserts that Mr. O'Brien was given a hearing and he presented no evidence. Brief of Respondent at 11. In fact, Mr. O'Brien was not present at the hearing and had no opportunity to provide his testimony. If the hearing was an evidentiary hearing, Mr. O'Brien's absence from the hearing denied him his constitutional right to be present under Const. art. 1, § 22. *State v. Walker* 13 Wn. App. 545, 558, 536 P.2d 657 (1974).

Moreover, Defense counsel did offer to provide testimony and

represented, as an officer of the court, that the intent of the parties was that the prosecutor would recommend concurrent terms. The prosecutor conceded that defense counsel might be correct.

If doubts remained, as the trial court found, then a hearing in which Mr. O'Brien was present should have been held.

F. MR. O"BRIEN SHOULD BE PERMITTED, IN THE ALTERNATIVE. TO WITHDRAW HIS PLEA OR SPECIFICALLY ENFORCE HIS RIGHT TO THE AGREED-UPON RECOMMENDATION AT A NEW SENTENCING HEARING.

Although Mr. O'Brien did not appeal his original Judgment and Sentence, he did not learn that the Department of Corrections was interpreting the Judgment and Sentence to mean that only the restitution provisions would run concurrently with his revoked DOSA sentences, until well after the time had run to file such an appeal. Since he never waived the right to appeal, however, he could still file a timely appeal of the entry of Judgment and Sentence to challenge an involuntary plea. Const. 1, § 22; *City of Seattle v. Klein,* 161 Wn.2d 554, 559-160, 166 P.3d 1149 (2007); *State v. Smith,* 134 Wn.2d 849, 953 P.2d 810 (1998); *State v. Kells,* 134 Wn.2d 309, 949 P.2d 818 (1998); *State v. Tomal,* 133 Wn.2d 985, 948 P.2d 833 (1997); State v. Sweet, 90 Wn.2d 282, 286, 581 P.2d 579 (1978).

Such an appeal should not be necessary, however. Mr. O'Brien is

entitled to a correction of Judgment and Sentence to reflect the intent of the parties and the trial court. Had the court intended that the sentence be consecutive to the revoked DOSA, the Judgment and Sentence would have indicated this. It did not. The court imposed a legal sentence which reflected the agreement of the parties, although it was not identified as an exceptional sentence.

If, however, his Judgment and Sentence is not corrected to reflect concurrent terms, Mr. O'Brien should be entitled to the remedy for the breach of his plea bargain -- of either withdrawing his plea or specifically enforcing his bargain at a new sentencing hearing in which the prosecutor makes the agreed-upon recommendation.

In *State v. Miller*, 110 Wn.2d 528. 756 P.2d 122 (1975), the Washington Supreme Court held that a defendant was entitled to specifically enforce a plea bargain based on a mutual mistake of fact, even where the sentence would be contrary to statute. In *State v. Barber, supra*, the Court overruled *Miller* to provide that the proper remedy was either to withdraw the plea or specifically enforce it at a new sentencing. *Barber* changed the remedy available to correct a sentence based on a mutual mistake of fact which resulted in an illegal sentence. Where Mr. O'Brien received a legal sentence, albeit an exceptional sentence, he should be no less entitled to a remedy that the appellants in *Barber* who did not receive

a legal sentence. If Mr. O'Brien does not receive a corrected, concurrent sentence, he should at least have the option of withdrawing his plea or seeking to specifically enforce it at a new sentencing hearing.

G. CONCLUSION

Mr. O'Brien respectfully submits that his case should be remanded for entry of an order clarifying that his current sentence should be run concurrently with his sentence for his revoked SODA. If there is any doubt about the facts in the case, an evidentiary hearing should be conducted,

. DATED this 14th day of November, 2011.

_____/s/_____
WSBA No. 14360
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on the 14th day of November, 2011, I caused a true and correct copy of the Reply of Appellant to be served on Respondent via e-file to her office and to Appellant via first class mail.

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GRIFFITH LAW OFFICE

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Statement of Arrangements

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Answer/Reply to Motion: ____

Brief: __Reply__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

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